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Supreme Court, U.S.
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No. 00-1920

IN THE

Supreme Court of the United States

DEERBROOK PAVILION, L.L.C.,
Petitioner,

v.

TOMMY G. THOMPSON, ET. AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Argument

I. The Opinion Of The Court Of Appeals Directly Conflicts With *Mead*.

Deerbrook Pavilion LLC ("Deerbrook") explained in its supplemental brief that the opinion of the court of appeals is directly inconsistent with this Court's recent opinion in *United States v. Mead Corporation*, ___ U.S. ___, 121 S. Ct. 2164 (2001). *Mead* holds that the judicial deference due to an agency's informal interpretation of a statute or regulation derives from *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, courts do not automatically afford "great deference" to agency positions. Rather, the deference due the agency's position depends on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U.S. at 140.

The federal defendants argue that *Mead* applies only to agency interpretations of statutes, not regulations. Br. at 9-10. One of the three authorities on which *Mead* relied for its holding on the applicability of *Skidmore* was *Martin v. Occupational Safety and Health Review Com'n*, 499 U.S. 144 (1991). *See* 121 S. Ct. at 2175. *Martin* applied *Skidmore* deference to informal agency interpretations of ***regulations***:

> [T]he Secretary regularly employs less formal means of interpreting regulations prior to issuing a citation. . . . Although not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers, these informal interpretations are still entitled to some weight on judicial review.

499 U.S. at 157, *citing Skidmore*.

It would make no sense to limit *Mead* merely to interpretation of statutes. That would simply invite agencies to enact broad, general regulations, and then argue that informal agency interpretations of those regulations are entitled to great deference. The consequent lack of any meaningful judicial review would leave agencies with no institutional check on arbitrary conduct. As explained in the Petition, the instant case is a perfect illustration of the policy disasters that flow from the lack of such institutional accountability.

The federal defendants' authorities are not to the contrary. Three of the cases deferring to the agencies' interpretation of its own regulation involved adjudications, not informal action like the Tirone memorandum. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 94-95 (1995); *Allentown Mack Sales & Serv. Inc. v. NLRB*, 522 U.S. 359, 377 (1998). Although it did not explicitly distinguish between *Chevron* deference and *Skidmore* deference, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 149 L.Ed.2d 401 (2001), clearly applied the latter. This Court afforded "due respect to the Service's reasonable, longstanding construction of the governing statutes and its own regulations." 149 L.Ed.2d at 408.

Justice Scalia's opinion in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), does afford *Chevron* deference to an agency's informal interpretation of its regulations. His concurring opinion in *Christensen v. Harris County*, 529 U.S. 576, 591 (2000), and his dissent in *Mead*, 121 S. Ct. at 2177, make it clear that *Auer* did not survive those opinions.

The federal defendants also assert that the Tirone memorandum was not the principal basis for the court of appeals' opinion. Br. at 8. If anything, that argument suggests that the Court should grant the Petition and remand the case so the court of appeals can decide the case based on the proper legal standard. The vote on the panel opinion was two to one and the vote on the en banc rehearing was five to four. The erroneous ruling on the deference due to the Tirone Memorandum could well tip the balance on so close a vote.

The cursory nature of the opinion is further evidence that the deference paid to the Tirone memorandum was critical to the outcome. The opinion's discussion of the law is only five paragraphs long. The first paragraph quotes that portion of the statute that gives HCFA discretion to determine "when and how" to collect civil money penalties, App. 6, but ignores the provision that HCFA may only deduct those penalties from sums "due to the person against whom the penalty has been assessed." 42 U.S.C. § 1320a-7a(f).

The second paragraph quotes the regulation that provides that the successor operator takes the provider agreement "subject to" all applicable statutes and regulations and to the terms and conditions of the original agreement. App. 6-7. Of course, this begs the question whether civil money penalties ***are*** a term and condition of the original agreement.

The third – and longest – paragraph discusses the Tirone memorandum and its rationale, and affords the memorandum "great deference." App. 7. The fourth and fifth paragraphs discuss *United States v. Vernon Home Health, Inc.*, 21 F.3d 693 (5th Cir.), *cert. denied*, 513 U.S. 1015 (1994). App. 7-8. This discussion entirely fails to

acknowledge the difference between the statute that *Vernon* construed and the statutes governing this case. The balance of the opinion is a series of wholly unfounded assumptions about the market for the sale of nursing homes. The "great deference" that the court of appeals afforded to the Tirone memorandum is the heart of its opinion.

The federal defendants also rely on *Wellington Oaks Care Center v. HCFA*, No. C-96-203 (Civ. Rem. Div. Jan. 28, 1997), *aff'd*, No. C-96-203 (HHS App. Bd. Aug. 21, 1997). The issue in *Wellington Oaks* was whether a change in ownership constituted good cause for an untimely request for a hearing, which has absolutely nothing to do with successor liability. The language on which the federal defendants rely is pure dictum.

The only legal support for either the court of appeals' opinion or the HCFA policy is the Tirone memorandum, and a Federal Register comment about the regulations based on the Tirone memorandum. Deerbrook ought to have an opportunity to have the court of appeals decide the case under the proper legal standard for assessing that memorandum.

In *Matz v. Household Int'l Tax Reduction Investment Plan*, 227 F.3d 971 (7th Cir. 2000), the court of appeals afforded *Chevron* deference to an amicus brief filed by the agency. This Court vacated that ruling, and remanded the case for reconsideration in light of *Mead*. ___ U.S. ___, 121 S. Ct. 2545 (2001). On remand, the court of appeals held that the agency's position, although reasonable, was not persuasive, and declined to follow it. 2001 WL 1027275 (7th Cir. 2001). The same disposition in the instant case is likely to produce the same result.

II. HCFA's Successor Liability Policy Is An Irrational Policy That Will Irreparably Injure The Very People It Is Supposed To Help.

The federal defendants argue that Congress has vested policy making authority with HCFA and that "sound reasons" support this particular interpretation. Br. at 7. These "sound reasons," however, consist primarily of a regurgitation of the court of appeals' unfounded assumptions about how the market for nursing homes functions.

The federal defendants never confront, let alone justify, the fundamental irrationality of this policy. To repeat, HCFA's policy is to relieve the guilty original operator of any liability whatever for the penalties that its conduct has caused and to transfer that liability to the entirely innocent successor. No one has ever explained how that policy can promote compliance with and deter violations of safety regulations. The reason is that no such explanation is possible.

Conclusion

For these reasons, Deerbrook respectfully prays that the Court issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

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